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In the Supreme Court of the United States

OCTOBER TERM, 1991

HANNA BOYS CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may assert jurisdiction over a religiously affiliated residential facility for troubled boys and require it to bargain with the union certified by the Board as the representative of its child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance employees.

2. Whether the Board reasonably exercised its discretion in ordering petitioner to bargain with the union despite the passage of time and employee turnover that occurred while petitioner was challenging its obligation to bargain.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Bishop Ford Central Catholic High School, 243 N.L.R.B. 49 (1979), enforcement denied, 623 F.2d 818 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981)	5
Burns Elec. Sec. Serv., Inc. v. *NLRB*, 624 F.2d 403 (2d Cir. 1980)	21
Catholic High School Ass'n of Archdiocese v. *Culvert*, 753 F.2d 1161 (2d Cir. 1985)	14
Christ the King Regional High School v. *Culvert*, 815 F.2d 219 (2d Cir.), cert. denied, 484 U.S. 830 (1987)	13, 14
Continental Web Press, Inc. v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984)	20
Denver Post of the Nat'l Society of the Volunteers of America v. *NLRB*, 732 F.2d 769 (10th Cir. 1984)	16
Employment Div., Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990)	19
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964)	19
Franks Bros. Co. v. *NLRB*, 321 U.S. 702 (1944)	19
Hanna Boys Center v. *Miller*, 853 F.2d 682 (9th Cir. 1988)	6
Jewish Day School of Greater Washington Inc., 283 N.L.R.B. 757 (1987)	5, 6
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	9, 16
Museum Assoc. v. *NLRB*, 688 F.2d 1278 (9th Cir. 1982)	21

Cases—Continued: Page

NLRB v. *Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981) 14
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 4, 8, 10, 11, 12, 18
NLRB v. *Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982) 19-20
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 19
NLRB v. *Katz*, 701 F.2d 703 (7th Cir. 1983) 20
NLRB v. *Katz*, 369 U.S. 736 (1962) 19
NLRB v. *Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981) 20
NLRB v. *Parents & Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989) 19, 20
NLRB v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 488 U.S. 828 (1988) 19, 20
NLRB v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) 16
Peretz v. *United States*, 111 S. Ct. 2661 (1991) 13
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 13
Sherbert v. *Verner*, 374 U.S. 398 (1963) 9, 18
St. Elizabeth Hosp. v. *NLRB*, 715 F.2d 1193 (7th Cir. 1983) 21
Tony & Susan Alamo Foundation v. *Secretary of Labor*, 471 U.S. 290 (1985) 15, 16
Tressler Lutheran Home for Children v. *NLRB*, 677 F.2d 302 (3d Cir. 1982) 16
Volunteers of American-Minnesota-Bar None Boys Ranch v. *NLRB*, 752 F.2d 345 (8th Cir.), cert. denied, 472 U.S. 1028 (1985) 16

Constitution, statute and regulation:

U.S. Const.:
Amend. I 9
Establishment Clause 9, 16, 17
Free Exercise Clause 9

Statute and regulation—Continued: Page

National Labor Relation Act, 29 U.S.C. 151 *et seq.*:
§ 2, 29 U.S.C. 152(2) 11
§ 8(a)(1), 29 U.S.C. 158(a)(1) 7
§ 8(a)(5), 29 U.S.C. 158(a)(5) 7
29 C.F.R. 102.48(d)(1) 7, 21

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A28) is reported at 940 F.2d 1295. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. B1-B10) is reported at 293 N.L.R.B. 359. The Board's decision in the underlying representation proceeding (Pet. App. C1-C14) is reported at 284 N.L.R.B. 1080.

JURISDICTION

The opinion of the court of appeals was filed on August 7, 1991. On October 30, 1991, the court filed an amended opinion and denied the petition for re-

hearing. On January 11, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hanna Boys Center (Center) is a non-profit, charitable corporation that operates a residential facility for troubled boys between the ages of nine and fifteen in Sonoma, California. Pet. App. C3, C6. The Center's stated purpose is "[t]o provide for the protection, care and education of homeless or neglected children; to provide homes for them; [and] to provide * * * for their mental, moral, physical and spiritual training during their minority." *Id.* at C4. The Center is licensed by the State of California as a group home for boys and is permitted by the County of Sonoma to operate as a private school. *Id.* at C6.

The Center was founded by two Roman Catholic priests and is located on property owned by the Diocese of Santa Rosa. Pet. App. C3. Its overall control is vested in a board of directors, only two of whose voting members are clergy.[1] The executive director, who is responsible for the general direction and control of the Center, is appointed by the Bishop of the Diocese of Santa Rosa, subject to the approval of the board of directors. The executive director must possess a master's degree in social work and has always been, but is not required to be, a priest. There is no requirement that Center residents or employees

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[1] The Bishop and the Vicar General of the Diocese of Santa Rosa are *ex officio*, non-voting members of the Board. Pet. App. C4.

be members of the Catholic or any other faith. *Id.* at C4-C5.

Approximately 64 young men live in cottages located on the Center's grounds year-round, with the exception of brief holiday periods and occasional visits to their homes. Pet. App. C6, C8. On a typical weekday, the residents arise at about 6:30 a.m., perform housekeeping chores, and are then led in groups to the Center's chapel for morning prayers, followed by breakfast. *Id.* at C8. From 9:00 a.m. to 3:00 p.m., the residents attend classes, with breaks for lunch, recess, and mandatory therapy sessions, which are administered by professional social workers and psychologists. *Id.* at C7-C9. Residents attend classes in standard academic subjects, and are required to take a "moral guidance" class taught by nuns, who instruct the residents in basic religious beliefs and ethical norms. *Id.* at C9-C10.

After classes, the residents return to their cottages and engage in recreation or work until 5:30 p.m., when dinner is served. After dinner, some residents take physical education classes and others remain in the cottage area. There are study and shower periods, followed by evening prayers and bedtime at 10:00 p.m. Pet. App. C9. In addition to the morning and evening prayers, the residents participate in mandatory prayers at the beginning and end of the six-hour classroom instruction period and say grace before and after each meal. *Ibid.* Each resident is required to attend mass on Sundays and holy days, and the Center provides the opportunity for residents to participate in voluntary religious activities such as daily mass, sacraments, and rosary devotions. *Id.* at C10.

The Center's staff includes approximately 16 or 17 child-care workers who live with the residents in the

Center's four cottages. Pet. App. C12; Tr. 77-78, 120. The "[c]hild-care workers 'shepherd' the boys from their cottages to chapel, supervise the boys in their cottages, and make sure the boys do their housekeeping chores and homework (which may include work from the moral guidance course), see that the boys say their prayers, and select a boy to say the evening prayer." *Id.* at C12. The Center's qualifications for child-care workers do not refer to religion. *Ibid.*

2. In September 1980, the Social Services Union Local 535, Service Employees International Union (Union) filed a petition with the Board for a representation election in units consisting of all full-time and regular part-time child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance employees (Unit A), and office clerical employees (Unit B). All professional workers, priests, nuns, and religious brothers were excluded from both units. The Center stipulated to the appropriateness of these units. Pet. App. A4, C1 n.1. It contended, however, that the Center is a church-operated school and, therefore, that the Board's assertion of jurisdiction is impermissible under the National Labor Relations Act (Act) as construed in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Center also objected to the Board's assertion of jurisdiction on First Amendment grounds. Pet. App. C1-C2.

Following a hearing, the Board's Acting Regional Director (ARD) determined that the Board's assertion of jurisdiction was proper because, although the Center is a school, it is not "church operated." Pet. App. C2. In March 1981, the Board granted the Center's request for review in order to give further consideration to the issue of jurisdiction under the Act. The representation election also took place in

March 1981 and the ballots were impounded pending the Board's resolution of the jurisdictional issue. *Id.* at A4-A5.

On July 17, 1987, the Board, relying on its recently issued decision in *Jewish Day School of Greater Washington, Inc.*, 283 N.L.R.B. 757 (1987), affirmed the ARD's assertion of jurisdiction over the Center. Pet. App. C1-C13.[2] The Board stated that "*Catholic Bishop* precludes the Board from exercising jurisdiction where a union seeks to represent a unit of *teachers* in a school whose purpose and function in substantial part are to propagate a religious faith." *Id.* at C11, quoting *Jewish Day School*, 283 N.L.R.B. at 761 (emphasis by the Board).[3] In this case, the Board found it unnecessary to decide whether the Center is a "school" and whether its "purpose and function in substantial part are to propagate a religious faith," *id.* at C13, n.3, because the Board determined that there were no teachers in the units sought to be represented by the Union. *Id.* at C11-C12. The absence of teachers was important because, as the Board had

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[2] Chairman Dotson dissented, indicating that he would, as a matter of policy, decline to assert jurisdiction over nonprofit, charitable institutions unless such institutions have a substantial impact on interstate commerce, which he found lacking here. Pet. App. C13-C14.

[3] Previously, the Board had taken the view that *Catholic Bishop* was limited to teachers in "church-operated" schools. *Bishop Ford Central Catholic High School*, 243 N.L.R.B. 49 (1979), enforcement denied, 623 F.2d 818 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981). *Jewish Day School* overruled that holding, explaining that *Catholic Bishop* emphasized the unique and vital relationship between student and teacher in carrying out the goals of schools with a religious mission, whether or not the school is church-operated. 283 N.L.R.B. at 760-761.

explained in *Jewish Day School*, "the source of the significant risk of constitutional infringement" that was present in *Catholic Bishop* "is the potential impact of the Board's processes on the relationship between school and teacher." 283 N.L.R.B. at 761.

In this case, the Board explained that "[w]ith the exception of child-care workers, the record is silent with respect to how these employees [recreation assistants, cooks, their helpers, and maintenance employees] are in any way connected to the possible religious mission of the Center." Pet. App. C11. The Board also rejected petitioner's claim that the "child-care workers are analogous to teachers." *Id.* at C12. The Board found that the child-care workers generally function as "someone akin to a 'dormitory monitor,' an authority figure to supervise the entrants when they are not in class." The Board added that "[t]here is no indication in the record that the child-care workers are required to, or do in fact, involve themselves in the religious or secular teaching of the entrants." *Ibid.*

The Board directed the Regional Director to count the impounded ballots. Pet. App. D.3.[4] Only the employees in Unit A voted in favor of the Union. In April 1988, the Regional Director certified the Union as the collective bargaining representative of

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[4] The Board denied petitioner's motion for reconsideration and to reopen the record for admission of new evidence as "lacking in merit." Pet. App. D2 & n.3; see also *id.* at E3. Petitioner then obtained a stay of the Board's order in federal district court. A motions panel of the Ninth Circuit summarily reversed and vacated the stay. The district court then dismissed petitioner's complaint. The Ninth Circuit affirmed the dismissal, holding that the motion panel's order had implicitly determined that the district court lacked subject-matter jurisdiction and that its ruling was the law of the case. See *Hanna Boys Center* v. *Miller*, 853 F.2d 682 (9th Cir. 1988).

the employees in Unit A. *Id.* at B5. The Board denied petitioner's request for review of the Regional Director's decision and its renewed request to reopen the record for consideration of "new" evidence, finding that the proffered evidence "would not alter [the Board's] prior conclusion" as to jurisdiction. *Id.* at F1-F2.

Petitioner refused to bargain. On the Union's unfair labor practice charge, the Board's General Counsel issued a complaint. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted summary judgment decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Board ordered petitioner to bargain with the Union and to provide it with requested information. Pet. App. B1-B8.[5]

3. The court of appeals enforced the Board's order. Pet. App. A28. Preliminarily, the court rejected petitioner's contention that enforcement of the Board's order should be denied because of administrative delay, *id.* at A8-A9, or because the Board refused to reopen the record to consider evidence of changes in the Center's structure, mission, and employees' duties occurring after 1981, when the election was held. *Id.* at A9-A11. The court explained that the

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[5] The Board rejected petitioner's contention that "new evidence submitted during the investigation of this unfair labor practice charge requires a new hearing." Pet. App. B3 n.5. The Board found that petitioner had "not shown that such evidence is newly discovered or previously unavailable," *ibid.*, as required by Section 102.48(d)(1) of the Board's Rules and Regulations, 29 C.F.R. 102.48(d)(1). The Board also found that the proffered evidence would not require a different result on the jurisdictional issue. Pet. App. B3 n.5.

"passage of time for the orderly adjudication of labor disputes cannot be used as a basis for denying an enforcement order." *Id.* at A10.

On the merits, the court rejected petitioner's claim that *Catholic Bishop* bars all assertion of jurisdiction by the Board over church-operated schools. Pet. App. A14-A16. The court pointed out that "[t]he facts of *Catholic Bishop* are confined to Board jurisdiction over teachers." *Id.* at A14. The court noted that the "constitutional question that the Court sought to avoid was that which would flow 'from the Board's exercise of jurisdiction over teachers in church-operated schools.' " *Id.* at A14-A15, quoting *Catholic Bishop*, 440 U.S. at 504. The court thus concluded that *Catholic Bishop* "was clearly founded on the 'unique role' of teachers in accomplishing the religious goals of the school." Pet. App. A15.

Applying that test, the court upheld the Board's finding that none of the bargaining-unit employees "are to any significant degree 'teachers' whose role is particularly involved with the accomplishment of the religious goals of [petitioner]." Pet. App. A17. The court observed:

> For all that appears, cooks primarily prepare food. Comparable conclusions can easily be drawn from the record regarding the other employees of the bargaining unit, with the possible exception of the child-care workers. Even there, however, the record supports the [B]oard's finding that the role of the child-care workers was not significantly involved with religion.

Id. at A17-A18. The court added that, while the job description of the child-care workers included a "teaching function," there was "no evidence that the actual duties of the child-care workers included any

teaching." *Id.* at A19. Accordingly, the court rejected petitioner's attempt to portray the employees in Unit A as being "intimately involved with the students as spiritual and theological mentors." *Ibid.*

Having determined that *Catholic Bishop* did not foreclose the Board's exercise of jurisdiction, the court of appeals addressed whether that exercise would violate the Religion Clauses of the First Amendment. Pet. App. A19-A20. In considering the Establishment Clause, the court applied the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As to the first two prongs of *Lemon*, the court observed that the record indicated that application of the Act to petitioner's non-teaching employees has a "secular purpose" and has "a primary effect that neither advances nor inhibits religion." Pet. App. A20-A21. Turning to the "entanglement" prong, the court concluded that in light of the fact that Board jurisdiction would be limited to overseeing labor-relations matters of secular employees who are not involved in furthering petitioner's religious mission, *id.* at A22-A23, "Board jurisdiction over [the unit] employees should involve the Board minimally, if at all, in [petitioner's] religious mission." *Id.* at A23.

The court also rejected petitioner's claim under the Free Exercise Clause. Applying the balancing test established in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the court found that "Board jurisdiction here will not interfere with the free exercise of *religious beliefs* of anyone at [petitioner]."[6] Pet. App. A27.

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[6] The court noted that after the parties had filed their briefs, this Court had limited the application of the Free Exercise Clause against certain generally applicable laws in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). Pet. App. A25. While expressing doubt as

The court explained that petitioner's free exercise rights are "scarcely implicated" because the "pervasively secular nature of the [unit] employees' duties ensures that Board involvement in labor disputes will be confined to the secular aspects of [petitioner's] operations." *Ibid.* That "minimal showing of any impact on religious belief or practice," the court concluded, does not outweigh the government's compelling interest in resolving labor disputes through the processes of negotiation. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-22) that the court of appeals' decision conflicts with *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). According to petitioner, that decision precludes Board jurisdiction over all employees of church-operated schools. The court of appeals, however, correctly interpreted *Catholic Bishop* not to apply to the non-teaching secular employees of such institutions as are involved in this case, and its decision does not conflict with the decision of any other court of appeals. Review of petitioner's claim is therefore unwarranted.

a. In *Catholic Bishop*, this Court found that the Board's assertion of jurisdiction over teachers in Roman Catholic parochial schools posed a significant risk of "entanglement with the religious mission of the school." 440 U.S. at 502. Applying its prudential practice of construing an Act of Congress to avoid a serious constitutional question if possible, the Court looked to see whether there was a "clear expression

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to the applicability of *Smith* to the facts of this case, the court concluded that it need not resolve that question, because petitioner's "free exercise claims do not survive even the less restrictive *Sherbert* balancing test." Pet. App. A25-A26.

of an affirmative intention of Congress that teachers in church-operated schools should be covered by the [National Labor Relations] Act." *Id.* at 504. Finding no such clearly expressed intention, the Court ruled that teachers in such institutions are not covered by the Act. *Id.* at 507.

Petitioner contends (Pet. 14) that, "although *Catholic Bishop* discusses the role of teachers, the Court's final decision rests upon its finding that Congress did not grant the Board jurisdiction over a certain type of employer, a church-operated school." That expansive reading of *Catholic Bishop* is incorrect. The issue on which the Court granted review in *Catholic Bishop* was "[w]hether *teachers* in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act." 440 U.S. at 491 (emphasis added). The Court acknowledged that "Congress defined the Board's jurisdiction in very broad terms," [7] but it required a heightened showing of congressional intent, beyond the language of the statute itself, because of the Court's perception that "the Board's exercise of jurisdiction over teachers in church-operated schools" would raise "serious First Amendment questions." *Id.* at 504. The Court's holding, which dealt only with teachers, plainly does not constitute a jurisdictional ruling as to any and all employees of a church-operated educational institution.[8]

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[7] Section 2 of the Act defines the term "employer" to include "*any* person acting as an agent of an employer, directly or indirectly," subject to eight identified exceptions (none of which applies to petitioner). 29 U.S.C. 152(2) (emphasis added).

[8] The Court noted that the bargaining units in *Catholic Bishop* were comprised only of teachers and did not include

Moreover, as the court of appeals correctly observed, Pet. App. A14-A16, the constitutional concerns that underpinned *Catholic Bishop*'s statutory holding flowed from the Board's claim of jurisdiction over teachers in particular, not simply any employees of a church-operated school. The Court emphasized that its cases addressing aid to parochial schools had "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." 440 U.S. at 501. The Court added that it is the "key role played by teachers" in such religious enterprises that gives rise to particular risks of entanglement of the secular and religious. *Ibid.* And the Court's analysis of the serious constitutional question presented in that case had to do specifically with "the Board's exercise of jurisdiction over teachers in church-operated schools." *Id.* at 504.[9]

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office clerical employees, maintenance employees, cafeteria workers, or watchmen. 440 U.S. at 493 n.5.

[9] Petitioner relies (Pet. 14) on *Catholic Bishop*'s statements that the Court's "examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools," 440 U.S. at 504, and that "[a] close examination of [the legislative history of the 1974 amendments to the Act] * * * reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction." *Id.* at 505. Those statements do not suggest that the Board lacks jurisdiction over such institutions for all purposes. The quoted statements were made in the course of the Court's search for a showing of clear congressional intent that was required because of the serious constitutional question raised by Board jurisdiction over *teachers* in church-operated schools. The holding of *Catholic Bishop* that an affirmative intent is required to apply the Act in that setting does not mean that a clearly expressed intent (beyond the statutory language) is required to apply the Act

In contrast, application of the Act to the employees of petitioner involved here—recreation assistants, cooks, cooks' helpers, maintenance employees, and child-care workers—does not trigger a serious constitutional question. See pp. 14-19, *infra*. With respect to these "secular employees who are not significantly involved in teaching," Pet. App. A17, and who have no significant involvement in furthering the religious mission of the school, *id.* at A18, A22, C12, there is no threat of unconstitutional intrusion on religious values. Accordingly, the court of appeals properly distinguished *Catholic Bishop* and declined petitioner's request "to construe the [Act] more narrowly than its plain language invites." *Id.* at A17.

b. There is no merit to petitioner's claim (Pet. 12-13) that the decision in this case conflicts with *Christ the King Regional High School* v. *Culvert*, 815 F.2d 219 (2d Cir.), cert. denied, 484 U.S. 830 (1987). There, a state labor relations board asserted jurisdiction over lay teachers at a religiously affiliated secondary school. The school claimed that the state agency's jurisdiction was preempted by the National Labor Relations Act. Citing *Catholic Bishop*, the Second Circuit rejected that contention, holding that "[s]ince the Supreme Court has held that [the Act] does not cover teachers in church-operated schools, * * * states are not preempted from regulating teachers in these schools." 815 F.2d at 222. The statement in *Christ the King* quoted by petitioner (Pet.

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in all other settings involving religiously oriented schools. Cf. *Peretz* v. *United States*, 111 S. Ct. 2661, 2667 (1991). Normally, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988).

13) that "the [National Labor Relations Board] does not have jurisdiction over church-operated schools," 815 F.2d at 222, is, at most, dictum.[10] Because only teachers were involved in *Christ the King*, the court had no occasion to consider whether the Board would have had jurisdiction over other types of employees, such as the employees involved here. And no holding of the Second Circuit has applied *Catholic Bishop* to a bargaining unit other than teachers.[11]

2. Petitioner contends (Pet. 16-17) that if *Catholic Bishop* allows the Board statutory jurisdiction over the school involved in this case, the exercise of that jurisdiction violates petitioner's First Amendment rights. In petitioner's view (Pet. 17), because "church-operated schools, especially Catholic schools, are permeated with a religious mission, all employees of the schools, not just teachers, are guided by religious goals and are subject to the doctrines and moral teachings of the church." The record in this case suggests otherwise, and, in light of that record, peti-

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[10] Moreover, the statement purported only to summarize the holding of *NLRB* v. *Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (*Catholic Bishop* applies not only to church-owned schools, but also to schools with a religious mission), cert. denied, 450 U.S. 996 (1981). *Bishop Ford*, like *Christ the King*, involved only teachers.

[11] See *Catholic High School Ass'n of Archdiocese* v. *Culvert*, 753 F.2d 1161, 1165 n.2 (2d Cir. 1985) (*Catholic Bishop* "held merely that the [National Labor Relations Board] did not have jurisdiction over lay teachers because there was no clear statement that Congress had intended to cover them"; accordingly, state jurisdiction over teachers was not pre-empted); *NLRB* v. *Bishop Ford Central Catholic High School*, 623 F.2d at 822 ("The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith.").

tioner's constitutional claims do not merit this Court's review.

a. The Board found that petitioner's cooks, cooks' helpers, recreation assistants, and maintenance workers are not "in any way connected to the possible religious mission of the Center," and that the Center's child-care workers are not required to and do not in fact "involve themselves in the religious or secular teaching of the entrants." Pet. App. C11-C12. The court of appeals, in reviewing the Board's order, found "substantial evidence in the record to support the Board's determination that [petitioner's] religious character and mission * * * [are] furthered by others than the employees of Bargaining Unit A." *Id.* at A22.[12]

The Board and the court of appeals "clearly took account of the religious aspects of [petitioner's] endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 299 (1985). Their finding that the unit employees are not involved in furthering the religious mission of the Center resolves "a factual question * * * barred from review in this Court 'absent the most

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[12] Although petitioner at times seems to emphasize the duties of the child-care workers, see Pet. 6, 7, 11, 19, petitioner's legal claim draws no distinction between the child-care workers and the rest of Unit A, which includes cooks, plumbers, electricians, gardners, and custodians. Pet. App. C1 n.1. In any event, no such distinction is warranted on the record here. As the court of appeals noted, petitioner stipulated to the appropriateness of the composition of Unit A, thus acknowledging that the child-care workers are "similarly situated for labor relations purposes with cooks and maintenance workers." *Id.* at A19.

exceptional circumstances.'" *Ibid.* In light of that finding, the issue presented by this record is whether the Constitution bars application of the Act to secular employees who are not significantly involved in furthering the school's religious mission. The court of appeals correctly held that it does not.[13]

b. The Establishment Clause is not infringed by applying the Act to the employees at issue here. Petitioner's sole contention is that the Board's assertion of jurisdiction would violate the third prong of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), "in that it would foster excessive state entanglement with

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[13] Other circuits have also rejected constitutional challenges to the Board's assertion of jurisdiction over employees who perform functions essentially similar to those involved here. See *Volunteers of America-Minnesota-Bar None Boys Ranch* v. *NLRB*, 752 F.2d 345, 348-349 (8th Cir.) (child-care, maintenance, laundry, and housekeeping workers at residential treatment facility for children), cert. denied, 472 U.S. 1028 (1985); *Denver Post of the Nat'l Society of the Volunteers of America* v. *NLRB*, 732 F.2d 769, 772-773 (10th Cir. 1984) (counselors in temporary care facilities for children); *Tressler Lutheran Home for Children* v. *NLRB*, 677 F.2d 302, 307 (3d Cir. 1982) (health care professionals, maintenance, housekeeping, and laundry employees in church-affiliated nursing home); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60, 64-65 (8th Cir. 1981) (maintenance, storeroom, and child-care workers at church-sponsored center for abused children). While those cases noted that the religiously affiliated institutions in question performed essentially secular functions, the Board here, in view of its finding that the employees involved were not teachers, never determined whether petitioner's "purpose and function in substantial part are to propagate a religious faith." Pet. App. C13 n.3. The court of appeals concluded only that Catholicism is "woven thoroughly into the institution" although the Center's "primary purpose and character is secular." *Id.* at A22.

religion." [14] Pet. 17. Petitioner claims that the resolution of unfair labor practices could impermissibly involve the Board in matters of religious doctrine.[15] Petitioner also claims that a bargaining requirement over conditions of employment in itself would inhibit the school's functions. Pet. 17-20.

Application of the Act to the bargaining unit employees, however, does not prevent petitioner from imposing discipline because of religious views. The Board's role would be to assess whether an employee was disciplined for activity protected by the Act, rather than for other reasons. Moreover, because the duties of the unit employees are "overwhelmingly secular, arbitration of grievances arising out of [their] employment should not involve the Board in issues of theology." Pet. App. A23. Finally, the requirement of identifying bargaining subjects for the

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[14] The court of appeals relied on *Lemon* in rejecting petitioner's Establishment Clause claim. Pet. App. A20-A25. The application of *Lemon* in a different context is before this Court in *Lee* v. *Weisman*, No. 90-1014 (argued Nov. 6, 1991). In the setting of *Lee*—governmental acknowledgement of religion in civic life and ceremonies—the United States has argued that the *Lemon* test should be replaced by an inquiry that focuses on whether the acknowledgement threatens the establishment of an official religion or coerces participation in religious activities. Brief for the United States as Amicus Curiae in *Lee* v. *Weisman*, at 6-7. (We have provided a copy of our amicus brief to petitioner.) Given the very different facts here, we do not believe that this case should be held for *Lee*. Whether or not this Court modifies *Lemon*, the Board's regulation of petitioner's labor relations in the present context does not constitute the establishment of religion.

[15] Petitioner posits the case of an employee who is disciplined for refusing to supervise daily prayers or for advocating views that contradict fundamental church teachings. Pet. 19.

employees here would not intrude on petitioner's religious goals for the Center.[16]

c. Petitioner's Free Exercise claim (Pet. 21-22) is also without merit. Petitioner makes no claim that Board jurisdiction over the Center violates petitioner's religious beliefs. "Catholic doctrine has no objection to unionization or collective bargaining" as such. Pet. App. A27. Nor does petitioner state that Board jurisdiction would interfere with petitioner's religious practices. Petitioner's only claim (Pet. 21) is that if it is subject to Board jurisdiction, it "will be required to negotiate terms that would otherwise be determined exclusively by Catholic doctrine."

Petitioner identifies no concrete doctrinal concerns that bargaining might infringe, and it is difficult to see how such conflicts would arise in bargaining regarding terms of employment for employees with "pervasively secular * * * duties." Pet. App. A27. Nor would petitioner be required to accept terms that violate religious teachings. In that setting, free exercise rights are "scarcely implicated." *Ibid.* Even assuming that those rights require a balancing of interests under *Sherbert* v. *Verner*, 374 U.S. 398 (1963), petitioner errs in contending (Pet. 21) that "the Board has no compelling interest in asserting jurisdiction over church-operated schools."[17] As in

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[16] The concerns raised by petitioner are similar to those noted by the Court in *Catholic Bishop*, 440 U.S. at 502-503, but the nature of the employees distinguishes this case from that one. In contrast to teachers at religious schools, whose functions are inherently interwoven with religious matters, the employees here have no significant religious function, making any potential conflict between the Board's jurisdiction and the school's religious mission remote at best.

[17] The court of appeals held that because petitioner's rights would not be infringed under *Sherbert*'s balancing test, it

other employment contexts, the government has a compelling interest in fostering negotiations so as to reduce labor unrest. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

3. a. Petitioner contends (Pet. 22-25) that the court of appeals should have denied enforcement of the Board's bargaining order because of unreasonable delay in adjudicating its jurisdictional challenge. As the court of appeals noted (Pet. App. A8), however, if enforcement of a bargaining order were denied because of lengthy administrative delay, the "effect would only be to continue the deprivation of the right of these employees to union representation, as provided by the NLRA." Accord *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507, 1509-1510 (2d Cir.), cert. denied, 488 U.S. 828 (1988); *NLRB* v. *Parents & Friends of the Specialized Living Center*, 879 F.2d 1442, 1457 (7th Cir. 1989). Nor is petitioner correct in claiming (Pet. 24) that the change in personnel in the bargaining unit during the Board's proceedings warrants a different result. Changes in personnel or a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain, even if the employees subsquently repudiate the union (which is not alleged to be the case here). See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros.* v. *NLRB*, 321 U.S. 702, 703-706 (1944).

Petitioner errs in claiming (Pet. 23-24) that the decision below conflicts with *NLRB* v. *Connecticut*

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was not necessary to consider whether the limitations on free exercise claims announced in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), apply in this context.

Foundry Co., 688 F.2d 871, 881 (2d Cir. 1982), and *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906, 912 (2d Cir. 1981). Although those cases denied enforcement, they did not turn solely on delay, but also involved "procedural mistakes" as petitioner acknowledges (Pet. 24). As the Second Circuit later explained in *Star Color Plate*, the disposition of those cases turned on the fact that flaws in the resolution of election objections made the Board's orders unenforceable and required additional proceedings. 843 F.2d at 1509. When that factor is not present, *Star Color Plate* makes clear that the Second Circuit does not deny enforcement solely because of delay. *Ibid.*

Nor is there a conflict with *NLRB* v. *Katz*, 701 F.2d 703, 709 (7th Cir. 1983). There, as in *Connecticut Foundry* and *Nixon Gear*, the court found that contested election objections required an evidentiary hearing before a bargaining order could be enforced, and, in light of the delay, the court declined to order a remand. In a case like this one, however, where the delay is "in large part due to the NLRB's reexamination of the jurisdiction issue," the Seventh Circuit has held that *Katz* is distinguishable and the Board's order should be enforced. *Parents & Friends*, 879 F.2d at 1457-1458. Finally, in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984), the court found that a remand was required for further articulation of the basis of the Board's unit determination before a bargaining order could be enforced. In those circumstances, and because 59 of the 72 unit employees had repudiated the union subsequent to the election, the court stated that it would not enforce a bargaining order should the Board reaffirm its unit determination after remand. *Id.* at 1094-1095. Those circumstances are not present here.

b. Finally, there is no merit to petitioner's contention (Pet. 25-26) that the Board erred in refusing to reopen the record to consider evidence of changes in the Center's corporate status, bylaws, Mission Statement, and duties of bargaining unit employees. The court of appeals found that petitioner was actually asking that the Board be required "to start all over again," Pet. App. A11, and it concluded that "such a procedure is not warranted by the nature of the 'new' facts offered here, and is prohibited by settled rules." Id. at A9.[18]

Petitioner claims (Pet. 25) that, because Board jurisdiction over an employer may be questioned at any time, the Board must reopen the record whenever it is alleged that new facts implicate its jurisdiction. The cases cited by petitioner (Pet. 25-26) do not support that assertion.[19] But in any event, the Board

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[18] The court noted that the Board's rules, 29 C.F.R. 102.48-(d)(1), provide that additional evidence will not be considered unless it "was in existence at the time of the proceeding before the Board, but has become available only since the close of the hearing" and "the moving party also demonstrates 'that the new evidence would require a different result.'" It found that the Board had not abused its discretion in applying that rule here. Pet. App. A10-A11 & n.3.

[19] In *St. Elizabeth Hosp.* v. *NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983), there was no request to reopen the record; rather, the court rejected the Board's contention that judicial review of the jurisdictional issue had been waived because it was not timely raised before the Board. In *Burns Elec. Sec. Serv. Inc.* v. *NLRB*, 624 F.2d 403, 409-410 (2d Cir. 1980), because the new evidence had been admitted during the unfair labor practice proceeding as pertinent to a separate unfair labor practice charge, the court found error in the Board's refusal to reconsider the validity of the original unit determination. And, in *Museum Assoc.* v. *NLRB*, 688 F.2d 1278, 1281 (9th Cir. 1982), the court enforced a bargaining order despite

did consider petitioner's proffer of additional evidence on the merits and determined that it "would not alter our prior conclusion" as to the propriety of its assertion of jurisdiction. Pet. App. F1-F2; see notes 4-5, *supra*. Petitioner's conclusory allegations are insufficient to show that the "new" evidence it sought to introduce would require a reassessment of the jurisdictional issue by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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allegations that the facts relevant to jurisdiction had changed while the case was *sub judice*, without prejudice to the employer's applying to the Board for reopening.

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